IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.T.SANKARAN

WEDNESDAY, THE 14TH NOVEMBER 2007 / 23RD KARTHIKA 1929

SA.No. 505 of 1993

(AGAINST THE ORDER DATED 18/08/1992 IN AS.102/1987 of II ADDL. DISTRICT COURT, TRIVANDRUM
*O.S. NO. 487 OF 1980 OF THE PRL. MUNSIFF'S COURT, NEYYATTINK*ARA.)

APPELLANTS/APPELLANTS/PLAINTIFFS:
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1. NARAYANAN VELUKUTTY,
   THEKKE THOTTATHU VEEDU,
   KARICHAL,
   KARUMKULAM VILLAGE (DIED ON 24.11.1992)

2. CHANDRIKA, WIFE OF NARAYANAN VELUKUTTY,
   POONTHIVALAKAM VEEDU,
   PULLUVILA P.O.,
   KARUMKULAM.

3. PRASAD, SON OF N. VELUKUTTY,
   POONTHIVALAKAM VEEDU,
   PULLUVILA P.O.,
   KARUMKULAM.

4. KUMAR, SON OF N. VELUKUTTY,
   POONTHIVALAKAM VEEDU, PULLUVILA P.O.,
   KARUMKULAM.

5. DILIP, SON OF N. VELUKUTTY (MINOR)
   REPRESENTED BY THE 2ND APPELLANT, HIS MOTHER,
   POONTHIVALAKAM VEEDU,
   PULLUVILA P.O.,
   ERNAKULAM.

BY ADV. SRI.PIRAPPANCODE V.SREEDHARAN NAIR

SA.No. 505 of 1993

RESPONDENTS/RESPONDENTS/DEFENDANTS 1 TO 16, 18 TO 24 & 26 TO 31 :
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1. JANAKI PUSHPA LEELI,
RESIDING AT KAVILKADAYARA VEEDU,
KARICHAL DESOM,
KARUMKULAM VILLAGE.

2. PUSHPA LEELI CHANDRIKA,
KAVILKADAYARA VEEDU, KARICHAL DESOM,
KARUMKULAM VILLAGE.

3. YOHANNAN RAJENDRA BABU,
KAVILKADAYARA VEEDU,
KARICHAL DESOM, KARUMKULAM VILLAGE.

4. YOHANNAN BALACHANDRAN,
KAVILKADAYARA VEEDU,
KARICHAL DESOM, KARUMKULAM VILLAGE.

5. CHELLAPPAN KAMALAN,
THOZHUKETTI ADACHATINKAM PURAYIDOM,
KARICHAL DESOM,
KARUMKULAM VILLAGE.

6. BHAGEERATHI DEVI,
THOZHUKETTI ADACHATINKAM PURAYIDOM,
KARICHAL DESOM,
KARUMKULAM VILLAGE.

7. BHAGEERATHI THANKAM,
THOZHUKETTI ADACHATINKAM PURAYIDOM,
KARICHAL DESOM,
KARUMKULAM VILLAGE.

8. CHELLAPPAN MONY,
THOZHUKETTI ADACHATINKAM PURAYIDOM,
KARICHAL DESOM,
KARUMKULAM VILLAGE.

*9. KOCHAN CHAKRAPANI,
THYKOOTTAM PURAYIDOM,
KARICHAL DESOM,
KARUMKULAM VILLAGE. (*Deleted)

10. MATHEVAN PONNU,
MELATHILVILAKATHU PUTHEN VEEDU,
KARICHAL DESOM,
KARUMKULAM VILLAGE.

11. XAVIER APPI CALLED AS RAMAN,
MALAMCHARIVU VADAKKE PUTHEN VEEDU,
KARICHAL DESOM,
KARUMKULAM VILLAGE.

12. KRISHNAN THANKAPPAN,
NADVYA PURAYIDATHIL ,
KARICHAL DESOM.

*13. SIVANI GONOI,
THOZHUKETTI ADACHATINKAM PURAYIDOM,
KARICHAL DESOM. (*Deleted)

*14. REV. FATHER SEBASTIAN DAS BENCHAMIN DAS,
SYNA COTTAGE,
PUTHIYATHURA PURAYIDOM. (*Deleted.)

15. SALARU NIKKOSTTA,
SYNA COTTAGE,
PUTHIYATHURA PURAYIDOM.

*16. SANKARAN SEKHARAN,
VARUTHATTU KADAYARA VEEDU,
VANKUZHI, VENPAKAL DESOM,
ATHIYANNOOR VILLAGE. (*Deleted)

*17. NARAYANAN KRISHNAN,
THEKKE THOTTAM PURAYIDOM,
KARICHAL, KARUMKULAM VILLAGE. (*Deleted.)

18. NARAYANAN APPU,
THEKKE THOTTAM PURAYIDOM,
KARICHAL, KARUMKULAM VILLAGE.

*19. CHAKRAPANI VIDYADHARAN,
THYKOOTAM PURAYIDOM,
KARICHAL DESOM. (*Deleted.)

20. CHAKRAPANI SREENIVASAN OF THYKOOTAM
PURAYIDOM, KARICHAL DESOM.

21. CHAKRAPANI VIJAYADHARAN,
THYKOOTAM PURAYIDOM,
KARICHAL DESOM.

22. CHAKRAPANI BABUJI,
THYKOOTAM PURAYIDOM,
KAKRICHAL DESOM.

23. CHAKRAPNI HARICHANDRAN,
THYKOOTAM PURAYIDOM,
KARICHAL DESOM.

*24. BHAGEERATHI OMANA,
THYTHOTTAM PURAYIDOM,
KARICHAL DESOM,
KARUMKULAM VILLAGE. (*Deleted.)

25. BHAGEERATHI SARASU,
THYTHOTTAM PURAYIDOM,
KARICHAL DESOM,
KARUMKULAM VILLAGE.

26. KUNJUKRISHNA PANICKER,
MANGALAKKAL VETTUVILA PUTHEN VEEDU,
KATTAKKADA,
NEDUMANGAD.

27. KRISHNA PANICKER SIVANANDAN,
MANGALAKKAL VETTUVILA PUTHEN VEEDU,
KATTAKKAD, NEDUMANGAD.

28. SARADA OMANA,
MANGALAKKAL VETTUVILA PUTHENVEEDU,
KATTAKKADA, NEDUMANGAD.

29. SARADA PADMAVATHI,
MANGALAKKAL VETTUVILA PUTHEN VEEDU,
KATTAKADA, NEDUMANGAD.

(*R9, R13, R14, R16, R17, R19 AND R24 ARE DELETED FROM THE PARTY ARRAY AT THE RISK OF THE APPELLANTS AS PER ORDER DATED 02.04.2004 ON I.A. 669 OF 2004.)

R1 AND R11 BY ADV. SRI.B.RAGUNATHAN
ADV. SHRI S. BALAN PILLAI.

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 14/11/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.T. SANKARAN, J.

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SECOND APPEAL NO. 505 OF 1993

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Dated this the 14th November, 2007

J U D G M E N T

The plaintiff in O.S.No.487 of 1980 on the file of the court of the Prl. Munsiff, Neyyattinkara is the appellant in this Second Appeal. The trial court dismissed the suit. On appeal by the plaintiff as A.S.No. 102 of 1987 on the file of the court of the II Addl. District Judge, Thiruvananthapuram, the appellate court dismissed the appeal. The appellant died pending Second Appeal and his legal representatives were impleaded as additional appellants.

2. The suit was filed by the predecessor in interest of the additional appellants for a declaration that he is in possession of the plaint B schedule property. Consequential injunction restraining the defendants from entering into the property was also prayed for. There is also a prayer for declaration that the decree in O.S.No. 20/1961 of the Munsiff's Court, Neyyattinkara and the execution proceedings therein are not binding on the plaintiff and the plaint B schedule property.

3. According to the plaintiff, the plaint B schedule property is part of the plaint A schedule property. Except B schedule property, rest of the property belong to the plaintiff and his mother. The plaint B schedule property is in the possession of the plaintiff for the last several years and he has perfected his

title by adverse possession. It is not stated in the plaint to whom the plaint B schedule property really belonged and how the plaintiff came into possession of the property and when he came into possession. The averments in the plaint in this regard are highly vague. It is also stated in the plaint that O.S.No. 20 of 1961 was filed by the defendants 1 to 4 in the present suit without making the plaintiff herein as a party to the suit. O.S.No.20 of 1961 was for partition . The plaintiff admits that a decree was passed in O.S.No.20 of 1961. His case is that since he is not a party to the said suit, the decree and the proceedings in execution of that suit are not binding on him. He also disputes the delivery of possession of the plaint B schedule property in execution of the decree in O.S. No. 20 of 1961.

4. The defendants contended that the plaintiff has no right or title to the plaint B schedule property. As per the decree in O.S.No. 20 of 1961, the co-ownership properties belonging to the parties to the suit were divided and the properties were delivered to the respective sharers. Defendant No.15 in O.S.No.20 of 1961 is the mother of the plaintiff. The defendants contended that there is no collusion in the institution or continuance of O.S.No. 20 of 1961 as alleged by the plaintiff. The case of prescription of title by adverse possession was also denied by the defendants. O.S.No.170 of 1964 was filed by Rajamma , the sister of the present plaintiff as well as by her husband to set

aside the decree in O.S.No. 20 of 1961. That suit was dismissed and the appeal therefrom was also dismissed. The defendants contended that the present suit was instituted after the defeat in O.S.No. 170 of 1964.

5. The trial court did not properly consider the pleadings and the evidence in the case. However, the trial court arrived at the conclusion that the plaintiff has not established the case put forward by him. Before the appellate court, the contentions put forward by the plaintiff/ appellant was that the trial court failed to exercise the jurisdiction vested in it and that there was no proper consideration of the suit on the merits. The court below agreed with this contention. But the appellate court thought that a remand to the trial court for that purpose was unnecessary in view of the fact that the evidence on record would enable the appellate court to decide the case on the merits. It was held by the appellate court thus in this context:

> *"It is further contended by the learned counsel appearing for the appellant that the pleadings and the evidence were not at all considered by the learned Munsiff and instead the suit was disposed by four sentences and it is not a proper disposal. True in a suit where various contentions are raised by the parties, the learned Munsiff is bound to consider the issues raised basing on the pleadings raised by the parties which are relevant to dispose the suit. The case of the appellant is that he has perfected his*

title to the plaint B schedule property by adverse possession and limitation and Ext. A1 decree is not binding on him. Apart from observing that the learned Munsiff is not satisfied with the evidence adduced and the evidence is insufficient to prove the case, the reason why the evidence is not accepted and why the learned Munsiff is not satisfied with the evidence is not stated in the judgment. It is clearly erroneous. But on that ground I do not feel it just on proper to remand the case back to the court below because if I do so, the parties have to wait for another 5 or 6 years to get a final disposal of the disputes involved in the suit. Evidence has been tendered by the parties and the evidence is on record. The court is therefore, competent to consider the evidence and enter a finding on merits. Therefore, I hold that a remand is not warranted in this case. "

6. In this Second Appeal, the following substantial questions of law are raised by the appellants for consideration:

"i) Were the courts below justified in holding that the plaintiff had not succeeded in proving adverse possession, when the plaintiff had both pleaded and proved that he has been holding the B schedule property for a period exceeding 12 years rightly , openly peacefully, uninterruptedly and continuously against the true owner and more particularly in the absence of any contra oral evidence.

ii) Has not the courts below committed a very serious mistake in holding that the plaintiff had failed to adduce evidence to prove that he was in possession of the B schedule property

without any interruption, when the very case of the defendants stands discredited by Exts. C1 and C2 report and plan.

iii) In the light of the commission report and plan that the property is not lying in the state and nature as described in the plan attached to the decree in O.S. 20/61 were the courts below justified in holding that the plaintiff has not perfected his title by adverse possession, without setting aside the aforesaid report and plan.

iv) Are the courts below justified in dismissing the suit when the plaintiff is in adverse possession of the suit properly for more than 30 years and therefore, as held in the decision reported in 1991 (1) KLJ 377 satisfies the requirement of adverse possession.

v) The plaintiff being admittedly not a party in O.S. 20/61 has not the courts below committed a very serious mistake in holding that the decree and judgment in the aforesaid suit is binding on him."

7. The lower appellate court considered the documentary and oral evidence as well as the pleadings in detail and came to the conclusion that the plaintiff has failed to establish the plea of prescription of title by adverse possession. It was held by the court below that there is no proper pleading to found the plea of adverse possession and that the plaintiff has miserably failed to establish that he was in possession continuously and uninterruptedly for the required period with the required animus to possess the plaint B schedule

property as against the true owner. The appellate court took note of the fact that the plaintiff has failed to plead the period from which his possession commenced and how did he come into possession of the plaint B schedule property. It was noticed that even in evidence, the plaintiff while examined as P.W.1 has put forward his case of adverse possession only after a leading question was put in that regard. P.W.1 has also admitted in evidence that he was in possession of the property under his mother. His mother was a party to O.S.No. 20 of 1961. If so, the plaintiff cannot legitimately put forward a contention that the decree in O.S.20 of 1961 is not binding on him or in respect of the property in question. The appellate court also did not rely on the evidence of P.W.2 and 3 as it was of the view that their evidence did not inspire any confidence in the court. It was noticed that though the case of the plaintiff is that he was continuously in possession of the property for the last 27 years, he has not produced a single tax receipt to prove that he has paid the basic tax for the property.

8. Shri V.S. Sudheer, learned counsel appearing for the appellants submitted that a perusal of the commissioner's report and plan in O.S.No.20 of 1961 and the commissioner's plan in the present suit would establish that the property in question is not lying in the manner as indicated in the final decree proceedings in O.S.No.20 of 1961, but as a single plot along with the property

on the eastern side. He also pointed out that the measurement and lie of the plaint B schedule property are not the same as that of the property which was allegedly delivered in execution of the decree in O.S.No.20 of 1961. Since some of the original documents were taken from the court by the first respondent and in spite of the direction, those documents were not produced before the court, learned counsel for the appellants produced before me the certified copies of those documents and I had occasion to peruse the same. The measurement of the disputed property as shown in the present suit is 52 links on the northern side and 63 links on the southern side, whereas the property which was partitioned and which is said to be the disputed property, the measurement on the northern side and southern side are respectively 40 links and 92 links. I do not think this is a relevant fact. Admittedly, on the eastern side of the disputed property, the property belonging to the mother of the plaintiff is situated. If there is any difference in the extent of the property delivered, the appropriate person who could have objected was the mother of the plaintiff. Admittedly, she has not raised any objection. The plaintiff cannot be aggrieved by the difference in measurement as now contended by the learned counsel for the appellants. Such a contention is not seen put forward before the court below. Therefore, it is clear that this contention is without any merit.

9. The learned counsel for the appellants submits that the respondents

have not adduced any oral evidence before the trial court and therefore an adverse inference should not be drawn against them on the aspect of the delivery of the property pursuant to the decree in O.S.No.20 of 1961. Taking into account the reliefs prayed for in the suit, the burden of proof was clearly on the plaintiffs to prove all the ingredients necessary to constitute adverse possession. No burden of proof did lay on the defendants to establish any particular fact. It was not necessary for them to prove that the property in question was delivered in execution of the decree for partition. When the plaintiff fails to prove that he has perfected title by adverse possession, he would not be entitled to get a decree in his favour. The defendants have no burden of proof in such a case. Therefore , non-examination of the defendants is not fatal to the defence put forward by them.

10. Learned counsel for the appellants pointed out that some of the documents were taken back by the first respondent from the court and inspite of the direction, he did not produce those documents . The learned counsel for the first respondent submitted that the first respondent has become old and senile and he does not know where the documents are. I need not express anything on this aspect since I am not relying on any of the B series documents produced by the defendant. I have considered the Second Appeal only in the angle as to whether the plaintiff/appellant has established his case to enable

him to get a decree and in considering the same, I have not relied on the documents which were taken back by the defendants . In fact, there was actual delivery of possession in execution of the decree in O.S.No. 20 of 1961. I am of the view that non-production of the documents which were taken back by the respondents is of no consequence.

I am of the view that the court below was justified in dismissing the appeal. The lower appellate court has considered all the facts and circumstances of the case and evidence on record and no error has been committed by the court below warranting interference in this Second Appeal. The questions of law raised in the Second Appeal do not really arise for consideration in the facts and circumstances of the case. The Second Appeal lacks merit and it is accordingly dismissed, however, without any order as to costs.

K.T. SANKARAN,
JUDGE.

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SECOND APPEAL NO. 505 OF 1993

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K.T. SANKARAN, J.

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S.A. No. 505 OF 1993

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Dated this the 14th November,2007

J U D G M E N T